

ESTTA Tracking number: **ESTTA579841**

Filing date: **01/02/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91213763
Party	Defendant KSX ENTERPRISE, INC.
Correspondence Address	FEI PANG LAW OFFICES OF FEI PANG 11 W DEL MAR BLVD STE 200 PASADENA, CA 91105-2505 fp@panglawyer.com;pangfei74@hotmail.com
Submission	Answer and Counterclaim
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Signature	/Fei Pang/
Date	01/02/2014
Attachments	Answer and counterclaim_01032014.pdf(424512 bytes)

Registration Subject to the filing

Registration No	4063774	Registration date	11/29/2011
Registrant	Inhale, Inc. 8616 Cuyamaca St. Santee, CA 92071 CANADA		

Goods/Services Subject to the filing

Class 034. First Use: 2007/06/01 First Use In Commerce: 2011/02/01

All goods and services in the class are requested, namely: Hookah, hookah pipes, hookah bases, hookah tobacco, vaporizer, and water pipes

Applicant, KSX ENTERPRISE, INC (“KSX”), for its answer to the Notice of Opposition filed by Inhale, Inc. (“Inhale”) against application for registration of KSX’s

trademark NEVER XHALE, Serial No. 85/929488 filed May 12, 2013, and published in the Official Gazette of October 29, 2013(the “Mark”), pleads and avers as follows:

1. Application denies knowledge and information sufficient to admit or deny the allegation of ¶ 1.
2. Application denies knowledge and information sufficient to admit or deny the allegation of ¶ 2.
3. Application admits the allegation of ¶ 3.
4. Application admits the allegation of ¶ 4.
5. Application admits the allegation of ¶ 5.
6. Application admits the allegation of ¶ 6.
7. Application denies each and every allegation contained in ¶ 7.
8. Application admits the allegation of ¶ 8.
9. Application denies each and every allegation contained in ¶ 9.
10. Application denies each and every allegation contained in ¶ 10.
11. Application denies each and every allegation contained in ¶ 11.
12. Application admits the allegation of ¶ 12.
13. Application denies each and every allegation contained in ¶ 13.
14. Application denies knowledge and information sufficient to admit or deny the

allegation of ¶ 14.

15. Application denies knowledge and information sufficient to admit or deny the allegation of ¶ 15.

16. Application denies each and every allegation contained in ¶ 16.

17. Application denies each and every allegation contained in ¶ 17.

18. Application denies each and every allegation contained in ¶ 18.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Oppose fails to state a claim upon which relief can be granted.

Second Affirmative Defense

As a result of Applicant's continuous use of the Mark since the time of Applicant's adoption thereof, the Mark has developed significant goodwill among the consuming public and consumer acceptance of the services offered by Applicant in conjunction with the Mark. Such goodwill and widespread usage has caused the Mark to acquire distinctiveness with respect to Applicant, and caused the Mark to become a valuable asset of Applicant.

Third Affirmative Defense

There is no likelihood of confusion, mistake or deception because, inter alia, the Mark and the alleged trademark of Opposer are not confusingly similar.

Fourth Affirmative Defense

Alternatively, any similarity between the Mark and Opposer's alleged trademarks is restricted to that portion of the Mark consisting of the word "xhale", which pronounced like "exhale", which is not distinctive. As a result, under the anti-dissection rule any secondary meaning Opposer may have in its alleged EXHALE trademark is narrowly circumscribed to the exact trademark alleged and does not extend to any other feature of the trademark beyond the word "exhale."

Fifth Affirmative Defense

Opposer's rights in and to the portion of its alleged EXHALE trademark are generic or, in the alternative, merely descriptive of the goods or services offered under the mark. Opposer's alleged mark is therefore inherently unprotectable absent acquired distinctiveness, which the alleged EXHALE mark lacks.

COUNTERCLAIM TO CANCEL REGISTRATION

1. Application repeats and realleges each and every allegation set forth in the foregoing paragraphs as if fully set forth herein.

2. Applicant hereby seeks cancellation of Opposer's Registration (Registration No. 4063774) issued November 29, 2011 for the mark EXHALE in International Class 034 for the application filed May 15, 2009.

3. The term "EXHALE" is not a newly created word coined by Opposer. Rather the

term "EXHALE" is a generic term to denote the body movement of breathing out or expelling air.

4. Opposer's alleged EXHALE trademark is thus not distinctive.

5. Opposer's alleged EXHALE trademark has not acquired distinctiveness.

6. Consequently, Opposer's alleged EXHALE trademark has no secondary meaning and cannot function as a trademark.

Application is filing by credit card the statutory filing fee of \$300.00 for its counterclaim for cancellation.

WHEREFORE, Application prays as follows:

(a) this opposition be dismissed;

(b) that Registration No. 4063774 be cancelled; and

(c) a registration for the term NEVER XHALE be issued to the Application.

Date: January 3, 2014

Respectfully Submitted,

KSX ENTERPRISE, INC

By: 

Fei Pang

Attorney for Applicant

CERTIFICATION OF SERVICE

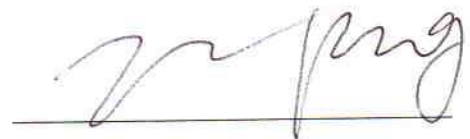
I certify that a copy of this NOTICE OF OPPOSITION is being served via USPS on this the 3rd day of January, 2014, to the following:

Opposer's Attorney/Representative:

Louis F. Teran
SLC Law Group
1055 E. Colorado Blvd., Suite 500
Pasadena, CA 91106
UNITED STATES

Opposer

Inhale, INC.
8616 Cuyanaca St.
Santee, CA 92071
UNITED STATES

A handwritten signature in dark ink, appearing to read 'Fei Pang', is written over a horizontal line.

Fei Pang